No. 11707

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

CONTINENTAL CASUALTY COMPANY, a corporation,
*Defendant and Appellant,*

*vs.*

THE UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY,
*Plaintiff and Appellee,*

A. J. GOERIG and CLYDE PHILP, individuals and co-partners,
*Defendants and Cross Appellants,*

SAM MACRI, DON MACRI and JOE MACRI, individuals and co-partners,
*Defendants and Cross Appellants,*

No. 11707

BRIEF OF APPELLANT
CONTINENTAL CASUALTY COMPANY

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION



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## JURISDICTION

This action was commenced in the federal district court under the Miller Act, U.S.C.A. title 40, sec. 270a, 270b; 49 Stat. 793, 794. It is expressly so stated in appellee Schaefer's amended complaint, and the jurisdiction of said court was expressly based thereon. (R. 2, 10). The district court so found. (95, 97, 104).

(All numerical references herein, unless otherwise indicated, are to the pages of the printed transcript of record herein. All italics are ours).

This is an action by a subcontractor to recover an alleged balance for services in the construction of a federal irrigation project, the defendants being the principal contractors, their partners or joint adventurers, and their surety.

The case comes within the usual appellate jurisdiction of this Court upon appeal from final judgments in actions at law or in equity. U.S.C.A. title 28, sec. 225. Final judgment was entered in the district court on May 1, 1947. (112-115). Notice of appeal therefrom was filed on May 20, 1947. (118).

## STATEMENT OF THE CASE

Where the principal contractors on a federal irrigation construction project breach the terms of a subcontract by them to be performed, so that the subcontractor's performance thereof is thereby delayed and rendered more difficult and expensive, and the subcontractor sustains damages by reason thereof, and the full agreed contract price has been paid to the subcontractor, and the same admittedly represents the full reasonable value of the services in performing said subcontract, were it not for such breach by the principal contractors, is the surety on the principal contractors' statutory payment bond liable to the subcontractor for damages for such breach of contract in a suit brought on a *quantum meruit* theory to recover the alleged reasonable value of the services performed?

That is the principal question involved on this appeal. The district court answered in the affirmative, in the erroneous belief that such is the state law in Washington and that the state law in such an action in the federal district court under the Miller Act is controlling. Appellant denies both of these propositions and contends that the said question should be definitely answered in the negative, and the action should be dismissed as to the surety.

This is an action brought by the appellee, the United States, for the use of M. C. Schaefer, doing business

as Concrete Construction Company, the subcontractor, against the appellants, Sam Macri, Don Macri and Joe Macri, doing business as Macri Company, the principal contractors, and A. J. Goerig and Clyde Philp, a co-partnership doing business as Goerig and Philp, Macri's silent partners and joint adventurers, and Continental Casualty Company, a corporation, their surety, to recover for certain losses sustained in the construction of earthwork and structures on certain laterals and sublaterals of the federal irrigation project known as the Roza Division, Yakima Project, near Yakima, Washington.

The use plaintiff, hereinafter referred to as appellee or Schaefer, sued to recover the sum of $57,618.87 as the alleged unpaid balance of the reasonable value of the work, labor and expenses on the theory of *quantum meruit* after alleged breach of the subcontract by Macri Company, the principal contractors, hereinafter referred to as Macri. (12).

The case was tried to the court without a jury, plaintiff's demand for jury having been waived. The court rendered a lengthy oral decision, (2208), made findings, (94), denied defendants' motions for judgment and for new trial, (115-117) and entered judgment in favor of the plaintiff in the sum of $56,764.97, together with interest at the rate of 6% from May 1, 1947, and costs in the sum of $921.70, against the defendants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners doing business as Macri

Company, and the Continental Casualty Company, a corporation, and each of them. (112).

This is an appeal of the defendant surety, Continental Casualty Company, from said judgment. (118). Thereafter defendants Goerig and Philp cross-appealed from the judgment which allowed this appellant to have judgment over against them. (114, 129). A considerable time after the taking of our appeal and the ordering of the record therefor, the defendants Macri also cross-appealed and ordered the remainder of the record. (136). See decision of this court, March 31, 1948, upon motion to dismiss Macri appeal.

Of course obviously if the action is dismissed on the appeal of Macri Company, it must be likewise dismissed on our appeal. It is elementary that the liability of a surety can never be greater than that of the principal.

Without repeating the same herein, we therefore rely upon the contentions made and authorities cited in the brief of appellant Macri Company herein. However, without waiving those contentions and without making any admissions as to the facts, we shall in this brief assume for the sake of the legal argument that the facts are in accordance with the contentions of the appellee Schaefer's evidence and the district court's findings of fact (94) as follows:

On December 7, 1943, appellant Macri Company entered

into a contract with the United States, No. 12r-14825 for earthwork, pipe lines and structures, laterals 59.3 to 69.8 and sublaterals, Roza Division, Yakima Project, Washington, for a total contract price of $128,550.95. (Pltf. Ex. 1; 96, 158, 172).

(The same was referred to in this record as contract or specifications No. 1062. Much evidence was introduced as to contract No. 1068 between the same parties, but the same is not involved on this appeal).

The work under the contract consisted of excavation work and thereafter the construction of numerous concrete structures.

On the same date appellant Macri Company as principal and this appellant Continental Casualty Company as surety executed a statutory "payment bond" to the United States as obligee in the sum of $64,275.48 pursuant to the said Miller Act of August 24, 1935, conditioned as follows:

> "*Pursuant to the act of Congress* approved August 24, 1935. . . .
>
> "Now, therefore, *if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract,* and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modification to the surety being hereby waived,

then this obligation to be void; otherwise to remain in full force and virtue." (Pltf. Ex. 1; 96, 158, 172).

This bond was written pursuant to Macri's written "application for bond," 'wherein the Macri partners agreed to indemnify this appellant against any loss thereunder and agreed to pay its reasonable attorneys' fees, costs and expenses. (Casualty Co. Ex. 10; 98, 105, 158, 172).

On December 11, 1943, Macri Company and Goerig and Philp entered into a written "joint venture agreement" whereby they agreed to divide the profits, if any, derived from said government contract, and each of them agreed to pay the losses and liabilities, if any, incurred thereunder. (Macri Ex. 7; 97, 98, 158, 176). Said joint venture agreement specifically ratified and adopted for and on behalf of said joint venture the bond and application for bond executed four days previously. (98).

The work to be done is described more fully in Specifications No. 1062 issued by the government. (Pltf. Ex. 3; 158, 174).

On March 14, 1944, Macri Company as principal contractor and Schaefer doing business as Concrete Construction Company as subcontractor entered into a subcontract whereby Schaefer agreed:

"To furnish all labor, and necessary equipment to do all the concrete work, formwork, cut, bend and install all reinforcing steel, all such work as shown on the

Plans and as specified in the Specifications No. 1062, Contract No. 12r-14825, Roza Division, Yakima Project, Washington. Subcontractor shall strip and clean all concrete forms, remove nails from same and pile same in neat piles, after concrete has been poured in accordance with Plans, Specifications and Government Inspection and has had the proper time to set up. Forms at completion to be the property of the General Contractor. . . .

"All materials except form wire, nails and curing material will be furnished by General Contractor or/and Owner. Subcontractor will furnish the above wire, nails and curing material. . . .

"That, subject at all times to the due performance by the Subcontractor of his agreements hereunder, the Principal Contractor shall pay the Subcontractor for the work as follows:

1: The total sum of Twenty Six & 00/100 Dollars per cubic yard of concrete installed
Dollars ($26.00), in current funds at Yakima, Washington. . . .

"For the purpose of fixing the amount of said payments the value of work done for which payment is made shall be computed according to estimates made, determined and allowed by the Principal Contractor. . . .

"5. If the work hereunder shall be delayed by any act, neglect or default of the Owner or of the Principal Contractor upon the entire work, or by fire, earthquake, Act of God, war, strikes, picketing or boycott not occasioned by any act of neglect of the Subcontractor, unavoidable delays of a common carrier solely due to accidents affecting the delivery of materials, or by abandonment of work by employees through no fault of the Subcontractor, then the time herein

fixed for completion of the work shall be extended for a period equivalent to the time lost by any or all of the reasons aforesaid; provided, however, that no such extension of time shall be made or allowed *unless the Subcontractor shall give the Principal Contractor notice, in writing, within five days* after the occurrence of any such act, omission or event, specifying the fact and cause of delay. . . .

"Any damage for which the Subcontractor may be liable hereunder, because of, or resulting from delay, shall not be mitigated or reduced because of the fact that such delay was caused by any act, omission or event hereinabove in this paragraph mentioned, *unless the notice above required is given by the Subcontractor to the Principal Contractor.*" (Pltf. Ex. 5; 99, 158, 175).

*No such written notice was ever given by appellee. No notice was ever given to appellant surety of Macri's alleged breach of contract.*

It is undisputed that the total agreed contract price under said subcontract at the agreed rate of $26.00 per cubic yard of concrete installed, based upon the total yardage of concrete as allowed by the government engineers, was $35,271.12. Prior to suit Macri paid Schaefer $32,614.66. It is so stipulated in the pre-trial order. (78, 104). This leaves an unpaid balance of the contract price of only $2656.46. (124,2258).

Appellee's claim is actually composed of two parts:

(1) Compensation for doing what was not included in the concrete work to be done by appellee under the

subcontract, but which on the contrary under the subcontract and the principal contract, were to be performed by Macri, the principal contractor, and

(2) For additional costs and expenses incurred by appellee in performing his own work under the subcontract by reason of delay thereof due to breach of contract by Macri in not having proper excavation or earth work and fine grading timely completed, form lumber of suitable quality available, etc.

Appellee has made no attempt to segregate his claim as between these two categories. He admits that he cannot do so. He admits that from day to day his men were spending a large part of their time doing the things which Macri should have done under the contract.

It is our contention that, manifestly, both of these claims or categories constitute damages for breach of contract on the part of Macri. Neither of them is work required to be done by appellee under the subcontract. Both are outside of the subcontract.

Appellee's voluminous evidence as to the alleged breaches of the subcontract by Macri are briefly summarized as follows in paragraphs 12, 13 and 14 of the district court's findings of fact:

> "That it was the obligation of the defendants Macri Company to do the excavation in such a way as to afford reasonable clearance and a reasonable oppor-

tunity for the subcontractor to properly and efficiently carry out its part of the work, and that the clearance reasonably required where a form had to be placed between the concrete and the bank required an excavation of 1 foot out at the base of the excavation from the outside wall of the concrete structure to be installed and a slope of one to one on the bank; that the excavation made by Macri & Company was not made in that manner but was made approximately one foot out from the base of the concrete structure and with practically vertical banks, and that the excavation was not done in a manner to give sufficient clearance, that is, there was not sufficient slope, there was not sufficient width in the excavation to enable the subcontractor to efficiently and properly construct his forms and that he was hindered in the progress of the work, and that the use plaintiff's carpenters installing the forms had to make extra excavation and that this was the rule rather than the exception in the progress of the work.

"That the defendants Macri and Company failed to do the fine grading in accordance with the lay-out plans and specifications; that it was defectively and improperly done and that in most instances the carpenters had to do the fine grading before they could install the forms and that this increased the amount of work the use plaintiff had to do and hindered and interfered with his progress of the work.

"That the defendants Macri Company failed to make the excavations on time and in an orderly sequence and manner so as to enable the use plaintiff to proceed as he should have been able to do with prompt progress of the work.

"That with reference to the lumber which the defendants Macri Company were to furnish under the subcontract on Job 1062, sufficient lumber was not furnished, it was not furnished on time and the quality was

not proper and suitable for the work intended; that much of the time there was missing some essential type of lumber so the work was hindered and delayed because of lumber not being properly furnished, not furnished in sufficient quantity and not furnished in the quality which was the minimum requirement for work of this kind.

"That the defendants Macri Company breached their subcontract in the particulars hereinabove set forth and that said breach on the part of defendants Macri Company was willful and negligent both as to the character of excavations and fine grading and the time it was done and the amount and quality of lumber and the time it was furnished and that this breach on the defendant Macri Company's part was a continuing breach which continued and existed and persisted throughout the entire performance of said contract 1062 until the very end of its performance by the use plaintiff." (100-102).

From time to time Schaefer made oral complaints to Macri, and Macri promised to do better, but according to appellee's evidence did not do so. (102-3).

The foregoing alleged breaches of the subcontract were denied by Macri and his witnesses, but without admitting the same, we shall assume herein for the sake of the legal argument that Macri breached the subcontract in said respects.

Each of the foregoing acts, if true, constitute a breach of the subcontract on the part of Macri. Appellee's evidence also showed that Macri's said breaches of the subcontract rendered performance thereof more difficult and

expensive for appellee through delaying and otherwise hindering his work and increasing the amount of work to be done by him in order to complete the job.

Appellee's evidence, if true, shows that in this manner he sustained substantial damages by reason of Macri's said breaches of the subcontract, in that the same was thereby rendered more difficult and expensive for appellee. Appellee, as we understand, concedes that the surety is not liable for damages for breach of the contract. He is attempting, however, to do indirectly what he admittedly cannot legally do directly, namely, recover damages from the surety for the breach of the subcontract on the ingenious theory of a *quantum meruit* recovery for the reasonable value of the services performed. He contends that the value of those services was far in excess of the agreed contract price, which (with a minor exception hereinabove stated) he has admittedly received, *by reason of such breaches* of the subcontract by Macri. *It is that excess for which he has recovered judgment against the surety herein.* The district court found that the reasonable value of the services performed was $89,498.71, from which was deducted the agreed contract price paid in the sum of $32,-614.66, and entered judgment against appellant surety, as well as Macri, for the difference in the sum of $56,764.97, plus interest and costs, the same being substantially the full amount sued for. ((104, 113; Pltf. Ex. 63).

*Appellee's evidence admittedly made no segregation of the items of expense incurred by him within and without the contract.*

It is also undisputed that appellee never gave Macri any written notice of any such breaches as required by the subcontract hereinabove quoted. (Art. 3, Par. 5, Pltf. Ex. 5; 175).

That appellee is actually seeking recovery of *damages* for Macri's alleged breach of contract is shown by the following statement of appellee's counsel in objecting to the introduction in evidence of a certain letter:

"My point is, it is wholly immaterial to whether we're *entitled to damages against Macri* or he's entitled to damages against us." (396).

Appellee on cross-examination admitted:

"Q. What were the things that you were requiring him to do in order for you to continue?

A. To change his method of excavation, and to do his own excavating instead of forcing it on us to do.

Q. *You then did a certain amount of excavating not required by the contract?*

A. *That's right.*

Q. *And you have the cost of that segregated, do you?*

A. *No.*

Q. Now, what other matters were you requiring Mr. Macri to do in order for you to stay?

A. For him to supply lumber, and to not only do the excavating according to specifications, but to get on with the excavation so we could make some progress in our work.

Q. You complained of his delay?

A. That's right.

Q. And what else, Mr. Schaefer?

A. Well, there was his general excavating, the hand excavating, and fine grading, the lumber, and the slowness of his progress in doing that work and supplying the lumber.

Q. *And those were all matters required of him under his contract and under the subcontract with you?*

A. *That's correct.*

Q. And are those the matters complained of in your first cause of action, Mr. Schaefer?

A. Yes.

Q. Making up the amount asked for in your first cause of action?

A. That's right." (406-7).

Appellee conceded that after April 29, 1944, the original written subcontract was abandoned and appellee was proceeding under a new oral contract:

"Q. Mr. Schaefer, after you had your conversation with

Macri in which you allege that an oral arrangement was made for extra compensation, *did you keep any separate track of the extra costs?*

A. Separating the costs?

Q. That's right.

A. *No.*

Q. *You have no means, then, of arriving at any figure that could be charged under your theory of the case to Mr. Macri under the so-called alleged oral contract?*

A. The oral agreement was that he was going to be paying all the costs. *There wasn't a dividing there between that which was contract and which was additional work, and you just couldn't possibly break down the number or give any definite proof* that you were only going to be required to make, we'll say, 25 trips, or 20 trips, from the yard to the job site, and that the rest of the hauling of the forms would be from structure to structure, as compared with the number of trips required and that we would make from the shop to each structure out in the field and back to the shop again with forms for repair; *it's just a physical impossibility.*

Q. Can you by date fix a time and place after which you assume that the original contract was abrogated and a new oral contract was substituted? . . . .

Witness: That was April 29 in the field, on job 1062, and again a verification of that on June 15. . . .

Q. Which date have you selected, Mr. Schaefer, June 15 or April 29?

A. Well, it was April 29, was the first agreement, and then the other was a verification of it.

Q. And your claim is an abandonment of the original contract after June 29—after April 29, is that correct?

A. My claim is that we had then an oral contract.

Q. You what?

A. I say, my claim is that we then had an oral contract." (1368-9-70).

Appellee further admitted:

Q. Mr. Schaefer, you made response to counsel that you couldn't submit a bill until the job was finished, for the additional cost. Will you please explain that?

A. How could I determine what my bill was to be until I was through with the job?

The Court: Well, answer the questions.

Mr. Olson: Mr. Schaefer, just answer the questions.

A. Well, I couldn't determine what my cost was until I was through with the job.

Q. *Then no detail at all was kept of any additional costs, is that correct?*

A. *No, we didn't keep the cost in that manner, no.*

Q. *You have no record, then, of any of the additional costs which you are stating that Mr. Macri caused you over and above your contract?*

A. We had a certain amount of segregation in our daily reports, but *there is so much of the work that you just couldn't segregate.*

Q. Was it a part of your agreement with Mr. Macri on April 29, and again spoken of on June 15, that no detail of additional cost would be submitted until the end of the job? . . . .

A. There was no such conversation, that is, there was no conversation on that point.

Q. There was no agreement on that point?

A. There was agreement that he was going to pay for all our additional cost and expense. He was going to pay for all our costs.

Q. *But you kept no record of the additional cost, is that correct?*

A. *Not as such, no. They weren't segregatable... You couldn't segregate them.*

The Court: . . . . I thought there was *no question here* at this stage of the trial that *there has been no effort to segregate the costs.* You make no claim of that, do you, Mr. Olson? I think your contention is that the oral contract entirely superseded the written contract, and that there was no occasion for a statement being made or rendered as to additional cost. Is that your position?

Mr. Olson: *That is our position* with reference to the oral agreement, your Honor." (2154-5-6).

Appellee's expert witness Allyn R. Hunter, who also wrote a bond for appellee, testified that he was present at

a conversation when Macri is alleged to have stated that he would pay appellee's *additional costs and expenses* on this job. (930-1).

Hunter also testified that if Macri had not breached the subcontract, appellee could have completed the same within 75 working days, and that the delay therein caused by Macri's breach of contract would make appellee's cost of performance two or three times more than it would have otherwise been. (939-943).

The impossibility of segregating appellee's cost of performing the subcontract, if Macri had properly performed, and his cost of performing in view of Macri's alleged breach, was further conceded by appellee's counsel:

> "Mr. Olson: Yes, but your Honor, the thing they are going on is that they want to segregate it, they want to take the contract price of so much and then place a separate and distinct value on those delays, and *that's not the theory of our case.* We're not limited to that, and they know, as we do, your Honor, that it is a physical and practical impossibility for anybody on this job to divide between the time it takes to put that form in how much of their time that they spent as carpenters in putting in the form if they hadn't been hampered by that bank, and how much of the time on each excavation was used up because of the bank being in the way, and the hole not being ready, so we go on this general testimony, your Honor, that had these things been done right, and I realize I'm using the word "right" loosely, but the Court understands me, that it could have been all done in four months, which, your Honor, wouldn't have carried this job over the winter, and it is by virtue of the fact

that instead of being able to do that we were held up thirteen months, I'm asking this witness if he can't evaluate within the confines of two or three times. If he can come that close to it, now, if the witness can, and he's an expert, if they can tear down his testimony on cross-examination, let them try. Counsel says he can evaluate that cost just as good as this witness can. Maybe he can, I can't. It seems to me it is proper to go into that for the purpose of substantiating in a general way what our costs were on this project." (949-50).

"Now, the statement I did make, your Honor, that it is impossible to take your contract and say that it covered for a certain amount of labor and materials, and to divide, structure by structure, the part of the services rendered that were rendered if the subcontract had been complied with by Mr. Macri and the amount of them that were the result of his non-compliance. . . . It is our position that by reason of his failure to perform this contract, that contract went out the window." (953).

*Appellee's witnesses conceded that the reasonable value of appellee's services in performing this subcontract, if Macri had properly performed the same, would not have exceeded the agreed price under the subcontract, namely, $26.00 per cubic yard of concrete.*

Appellee's witness Hunter testified:

"At the time this job was estimated I worked up the figures myself on it, and had somewhere in the neighborhood of $26.00 or $27.00 as a final figure; that is excluding the aggregates and cement and lumber. . . .

Q. Is that, in your opinion, Mr. Hunter, *the fair and reasonable cost or value of these services* referred to in my question?

A. *It is.*

The Court: I assume that $26.00 or $27.00, was that a cubic yard of concrete? I just want to be clear on it.

A. Cubic yard." (960).

"Well, I think that *the bid which was made out by Mr. Schaefer,* which I saw myself at the time the bid was made out, *was ample.*" (958).

The same covers all of the items undertaken by appellee's subcontract. (962).

Appellee's expert witness Lawrence E. Bufton conceded that the reasonable value of appellee's services in performing the subcontract, if Macri had properly performed, was a little over $27.00 per cubic yard of concrete, or substantially the amount of the agreed contract price. (1160-3).

Appellee's accountant, L. R. Hendershott, conceded:

"Q. Mr. Hendershott, in your examination of the original records *did you find any segregation made on the Concrete Construction Company's books that would indicate extra items charged over and above the contract.*

A. *No, sir. There is no segregation on the books.*" (1298-9).

The district court based the amount of appellee's recovery upon Pltf. Ex. 63 prepared by appellee's accountant,

L. R. Hendershott, which is an alleged summary of appellee's costs and expenses in the performance of this job, together with certain expenses in preparing for this litigation, and overhead and profit items. (1241-2, 1252-1264).

Pltf. Ex. 63 includes, and the court allowed recovery of 20 per cent for overhead expense, plus an additional 10 per cent for profit, shown by Hendershott's testimony:

"A. That's overhead expense. It was based on 20 per cent of the direct cost. That total is $13,582.82.

Q. What relation does that figure have to $68,447.66?

A. That represents 20 per cent of it." (1258).

"Q. Now your profit, 10 per cent, will you explain that figure?

A. That is 10 per cent of the total direct and indirect costs. The overhead is regarded as indirect cost. It is 10 per cent of the total of the direct and indirect costs; it amounts to $8203.05.

Q. And that makes a total figure of how much?

A. $90,233.53. . . .

Q. What is that figure supposed to indicate, as far as your examination?

A. That's the total costs, including profit, on the job.

Q. All right. Now, your payments received is your next item shown there. How much did the books and records show had been paid?

A. $32,614.66." (1261).

The district court held that appellee could not recover on his first cause of action based on an alleged express oral agreement of Macri to pay extra costs, but only on his alternative second cause of action based on *quantum meruit.*

The district court in his opinion stated:

"In short, the court finds that Mr. Macri breached the subcontract, or those portions of them to be performed by him in the particulars which I have designated; that his breach was willful and negligent, and that was true both as to the character of excavations and fine grading and time it was done, the amount and quality of lumber and the time it was furnished, and that this breach of Mr. Macri's part was a continuing breach, which continued and existed and persisted throughout the entire performance of this contract until the very end of its performance by Mr. Schaefer. . . .

"*However, the court cannot find under the record here that there was a meeting of the minds, or an express contract* that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all of his costs. *I think such a finding would be inconsistent with the other testimony in the case here, and with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the testimony, offered to turn it over to him.* He continued to complain. It's hard to conceive how he would have cause for complaint if he was to get paid for everything anyway, but he continued to complain, and I think *his conduct isn't consistent with the meeting of the minds and an express*

*contract that Mr. Macri was to pay for the fair value of the services. . . .*

"*Now, coming to the law applicable to this situation, it is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy,* United States vs. John A. Johnson and Sons, 65 F. Supp. page 527, *if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company.* However, it is my view that in these cases, although *there is involved the construction of the Federal statute, the Miller Act,* that nevertheless, so far as the substantive rights are concerned, that *the law of the state* is entitled to first consideration." (2213-5).

"*I had some difficulty coming to a conclusion* as to whether general overhead should be included. I'm inclined to think that it should. . . .

"The item of profit is *another troublesome one.*" (2222).

The district court stated that the issue involved on this appeal is a close question, saying:

"As to Goerig and Philp's liability to Schaefer, and while it might seem at first blush that that is unimportant, I think that *it might very well be, because this is a close case, and these questions are close* and in some respects novel ones; and if *the appellate court should hold that the bonding company are not liable,* then I think the question of whether Goerig and Philp are bound would be important." (2225).

"*I know it is a close and difficult question.*" (2229).

On July 15, 1944, while the work was still in progress, Macri Company and Goerig and Philp entered into a written agreement terminating their joint venture agreement

previously existing. (Macri Ex. 7; Goerig Ex. 9; 98, 158, 175, 1301, 2223-5, 2232-8). It is undisputed that no one else was notified of the termination of the joint venture agreement. (1301, 2248-9).

The Macri partners in their application to this appellant for the bond agreed in writing to indemnify appellant against any loss or liability and to pay appellant's costs, expenses and reasonable attorneys' fees. (Casualty Co. Ex. 10; 98, 158).

The district court denied all of appellant's motions, asd entered judgment as above stated in favor of appellee, from which this appellant, and later Macri Company, have appealed. Goerig and Philp have cross-appealed from the judgment over entered by the court in favor of this appellant against Goerig and Philp as the partners or joint venturers of Macri Company.

## SPECIFICATION OF ERRORS

The district court erred:

1. In denying the motion of this defendant-appellant, Continental Casualty Company, for dismissal as to it at the close of the plaintiff's evidence. (951-2, 1376-7).

2. In denying the motion of this appellant for dismissal as to it at the close of all of the evidence. (2206).

3. In making finding of fact No. 15, and particularly

in holding that there was any implied agreement or quasi-contract that appellee was to be paid the reasonable value of his work under the subcontract with the extra burdens imposed upon him by Macri Company's breach thereof, for the reason that the same is contrary to law and is not a legal or proper basis of liability of the contractor's surety, and the same is contrary to the evidence. (102-3).

4. In making finding of fact No. 16, and particularly in finding that appellee performed services of the reasonable value therein stated and that there is a balance owing as therein stated, for the reason that the same is contrary to the evidence and contrary to law as relating to this appellant surety. (103-4).

5. In making conclusion of law No. 1 that plaintiff should recover judgment against this appellant in the sum of $56,764.97 and costs or any other sum, for the reason that the surety is not legally liable for more than the agreed contract price. (109-10).

6. In entering judgment in favor of appellee against this appellant in the sum of $56,764.97 and interest and costs, or any other sum. (113).

7. In denying this appellant's motion for new trial. (115-7).

8. The court erred in refusing to dismiss the action as to this appellant, Continental Casualty Company.

9. The court erred in finding and holding that this appellant is liable as surety on the contractor's payment bond for the reasonable value of the work performed by appellee subcontractor in excess of the agreed contract price, for damages for breach of contract by the principal contract in performing the subcontract, either upon a quantum meruit theory or otherwise, especially where, as in this case, it is undisputed that no segregation was made of the cost of performing the subcontract as written and as actually performed, in other words, no segregation of the items of the subcontractor's expenses within and without the said subcontract.

10. The court erred in rendering judgment in favor of appellee and against this appellant for the reasons that the surety on a contractor's payment bond, such as this appellant, is not legally liable for damages for breach of the principal contractor Macri Company in the performance of its subcontract with appellee, and there was no evidence presented segregating the items of the appellee's expenses within and without the said subcontract.

11. The court erred in concluding and holding as a matter of law that under the Miller Act the surety on the contractor's payment bond is legally liable for payment of compensation to a subcontractor on quantum meruit for labor and material furnished and the reasonable value of the work done necessitated by breach of the subcontract

by the principal contractor by delaying the job or improperly performing the same or failing to do the things required under the said subcontract, and the court erred in rendering judgment in favor of the appellee against this appellant upon that basis.

12. The court erred in failing and refusing to hold that any amounts recoverable by appellee from appellant Macris in excess of $2,656.46 was without the scope of the said subcontract and therefore not recoverable against the surety, Continental Casualty Company.

13. The court erred in concluding and holding that the law of the State of Washington governed and that under said law appellee is entitled to such recovery against this appellant.

14. The court erred in concluding and holding that this appellant is liable, among other things, for overhead expenses and alleged loss of profits of appellee. (2222).

## ARGUMENT

### 1. SUMMARY OF ARGUMENT

Our principal contentions herein may be briefly summarized as follows:

1. The federal law governs, rather than the law of the state of Washington. This is not a case of concur-

rent jurisdiction based on diversity of citizenship. Jurisdiction of the federal court herein is based solely and entirely upon the fact that this is an action under the Miller Act. (U.S.C.A., title 40, sec. 270 (a) and (b); 49 Stat. 793, 794). Jurisdiction is expressly based thereon in both appellee's amended complaint and the findings of the district court. (2, 10, 95, 97, 104).

This appeal involves a question of liability arising under a federal statute. As to such a question, of course, the decisions of the federal courts, rather than state courts, are controlling.

2. However, the law of the State of Washington supports rather than opposes our position herein. The Washington cases, considered as a whole, establish that the surety is not liable in such a case.

3. A surety on a federal construction project under the Miller Act is not liable for damages for breach of the subcontract by the principal contractor, either on the theory of quantum meruit for the reasonable value of services performed due to such breach of contract or otherwise, and particularly where as here there is admittedly no evidence of segregation of the items of expense within and without the original subcontract. This is merely an indirect means of the subcontractor recovering damages for breach of the subcontract by the prin-

cipal contractor, which legally may not be done against the surety.

The court therefore erred in concluding and holding that the surety on the contractor's payment bond given pursuant to the Miller Act is legally liable for payment of compensation to a subcontractor on quantum meruit for labor and material furnished, for the reasonable value of the work done necessitated by breach of the subcontract by the principal contractor by delaying the job or improperly performing the same or failing to do the things required of him under the said subcontract.

The agreed contract price has been fully paid with the exception of the retained percentage in the sum of $2656.46. Any amount recoverable by appellee from Macri in excess thereof was without the scope of the subcontract and therefore not recoverable against the surety.

The total agreed contract price under the subcontract was $26.00 per cubic yard of concrete or a total of $35,271.12. It was stipulated at the pre-trial hearing and is undisputed that of that sum practically all, namely, $32,614.66, was paid by Macri to appellee prior to suit. (78).

4. In any event the surety would not be liable for overhead expenses and alleged loss of profits of appellee, nor for any items except labor, as erroneously allowed by the district court.

5. Appellant is entitled to recover additional reasonable attorney's fees for services on this appeal.

## 2. THE ACTION BEING BASED UPON A FEDERAL STATUTE, THE MILLER ACT, THE FEDERAL RATHER THAN STATE LAW GOVERNS.

This is admittedly an action brought by the United States for the use of appellee to recover upon a payment bond executed by Macri as principal, and this appellant as surety, pursuant to the federal statute known as the Miller Act. Federal jurisdiction was expressly based thereon in both appellee's pleadings and the court's findings of fact. Jurisdiction is not based upon diversity of citizenship. The principal question on the appeal is a pure question of federal rather than state law, namely, the extent of the liability of the surety on a payment bond executed pursuant to this federal statute. The district court therefore clearly erred in following what he erroneously believed to be the state law in Washington and disregarding the repeated decisions of the federal courts upon this question.

Manifestly an act of Congress such as the Miller Act, should be interpreted uniformly by the federal courts throughout the nation rather than subjected to varying interpretations based upon the purely accidental circumstances of the law of the state in which the federal court is sitting.

This appeal does not even involve any disputed question of construction of the subcontract. It involves only the legal question as to the extent of liability of the surety under the Miller Act. Manifestly the bond is executed pursuant to federal statute and its construction is controlled by federal rather than state law.

If this were not so, why did Congress give *exclusive jurisdiction of* suits on such statutory payment bonds to the federal district courts? It did not have to do this; it could have given both courts concurrent jurisdiction and given plaintiff the option of selecting the forum for enforcing his rights, if any.

Congress chose not to do so, however, probably doubting whether the state courts would uniformly follow the federal law, and therefore vested sole and exclusive jurisdiction of such actions in the federal courts. Otherwise. if state law were to control, it would mean that in one state a plaintiff materialman may recover and in another he may not, even though both of them are claiming under the same federal law. Congress chose not to permit such a situation.

While there must of course be express or implied contract to pay for labor or material before there is any obligation either on the contractor or the surety to pay, yet such a contract standing alone would not create liability on the surety. Its liability, if any, is solely the outgrowth

of the federal statute and the bond executed pursuant thereto. The statute cannot be ignored, but must be directly construed in determining whether or not such liability of the surety exists.

In *Erie Railroad Co. vs. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487, the landmark case in holding that *in diversity of citizenship cases* the federal courts should follow the state law, the Court construed the "Rules of Decision" statute, U.S.C.A. title 28, sec. 725, which provides:

> "The laws of the several States, *except where the* Constitution, treaties, or *statutes of the United States otherwise require or provide,* shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The Court in the Erie case said:

> "The purpose of the section was merely to make certain that in all matters *except those in which some federal law is controlling,* the federal courts *exercising jurisdiction in diversity of citizenship cases* would apply as their rules of decision the law of the State, unwritten as well as written. . . . *Except in matters governed by* the Federal Constitution *or by Acts of Congress,* the law to be applied in any case is the law of the State."

In other words both the federal statute and the Erie case construing the same, expressly recognize that state law is not controlling in actions where federal jurisdiction

is based upon federal statute rather than diversity of citizenship.

This was expressly recognized by this court in *Liebman vs. United States,* 153 F. 2d 350, an action based on this same Miller Act in which Judge Garrecht, speaking for this court, said:

> "This contention of appellants is bottomed on the *Erie* R. Co. *v. Tompkins* rule. The *Erie R. Co. v. Tompkins* case, 304 U. S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188, 114 A.L.R. 1487, plainly states: *"Except in matters governed by* the Federal Constitution *or by acts of Congress,* the law to be applied in any case is the law of the state.' *This case was brought in the name of the government under a federal statute."*

In *U. S. v. Conti* (C.C.A. 1) 119 F. 2d 652, a case involving a federal construction project in Massachusetts, the court held to the same effect, and stated that the federal law rather than the Massachusetts cases, was controlling, saying:

> "We do not think that the Bowers case is controlling in the instant case on the liability of the defendant for the damages sustained by the plaintiff as a result of the defendant's failure to perform. In that case the court's decision was based, not upon any general principles of the law of contracts, but upon an interpretation and application of Massachusetts statutes regulating the letting of contracts for the construction or repairs of public buildings or other public works on behalf of counties, cities and towns in the state. These regulations of course *are not applicable to contracts for public works let by the federal government."*

In *U. S. v. Clifford* (C.C.A. 3) 137 F. 2d 565, (reversed on other grounds in 322 U. S. 102), likewise a Miller Act case, Judge Dobie, speaking for the court, said:

> "The court below relied heavily on a number of decisions construing state public work statutes. *These authorities, of course, are not binding on us in the interpretation of federal legislation,* and at best they are deceptive since the purpose, scope and terms of the state enactments are so varied and so different from the act under consideration. . . . Accordingly, for the reasons assigned, the judgment of the lower court is reversed."

In *First Camden Nat. Bank vs. Aetna Casualty Co.* (C.C.A. 3) 132 F. 2d 114, affirming 43 Fed. Supp. 596, 601, to the same effect, the court said:

> "The bank is not suing on the bond on which the appellant is surety. If that were the case, the federal court would have jurisdiction not by virtue of diversity of citizenship and the amount in controversy, but by express mandate of the Heard Act, authorizing suit in the federal court in the name of the United States, irrespective of the amount in controversy. 40 U.S.C.A. 270. *Then federal law might well be controlling.* See *United States v. Clearfield Trust Co.,* 3 Cir. 130 F. 2d 93."

In *U. S. v. Clearfield Trust Co.* (C.C.A. 3) 130 F. 2d 93, the court said:

> "If the rights of the plaintiff are to be determined by Pennsylvania decisions the judgment of the lower court was right. . . . We think the question is rather whether the rule of *Erie R. Co. v. Tompkins,* 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487,

applies so that we are constrained to look to the law as declared by the state courts as a measure of the rights and liabilities of the parties. *We think it does not so apply. The plaintiff is not in federal court by virtue of diversity of citienship, but by the expressed provision of the Judicial Code giving it the right to sue.* The payment for which this check was given grew out of services performed under an Act of Congress, the Federal Emergency Relief Act. 15 U.S.C. ch. 16, § § 721-728. The forgery was an offense against the laws of the United States. We think all these facts *distinguish the situation* from that presented in *Erie R. Co. v. Tompkins, supra,* where under the diversity of citizenship clause the sole purpose of federal court jurisdiction is to provide a tribunal to dispense justice impartially between citizens of different states. Our conclusion is strongly supported by a group of decisions in which the Supreme Court has been called upon to determine, in the light of *Erie R. Co. v. Tompkins* and cases following it, whether a particular question not expressly answered by the Constitution, treaties or statutes of the United States is to be determined by reference to state precedents or by federal courts in the light of their own body of decisions and their own notions of the proper rule of law. Thus the matter of interest in the recovery of taxes improperly assessed upon Indian lands was held to be a matter concerning which state decisions were not controlling. The same result was reached where the problem was the judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Bank Act. So, too, the liability for interest of a surety on a bond furnished the United States to accompany a taxpayer's claim for abatement of tax liability was held to be a question upon which state decisions did not control the answer given by the federal court. . . .

"But we do think, however, that in this case the facts in litigation originate fully as directly from the Con-

stitution and statutes of the United States as in the Supreme Court cases just mentioned and in this case, as well as in those, the federal courts are not bound in their determination of the legal consequences of the transaction by what the courts of the state, where the operative facts occurred, have held with regard to the general question involved."

The foregoing was affirmed in *Clearfield Trust Co. v. U. S.*, 318 U. S. 363, 87 L. Ed. 838, where the court said:

"We agree with the Circuit Court of Appeals that the rule of *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487, does not apply to this action. The rights and duties of the United States on commercial paper which it issues *are governed by federal rather than local law.* When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of (April 8) 1935, 49 Stat. 115, c 48. The authority to issue the check *had its origin in the* constitution and the *statutes of the United States* and was in no way dependent on the laws of Pennsylvania or of any other state. *Cf. Jackson County v. United States,* 308 U. S. 343, 84 L. ed. 1361, 61 S. Ct. 995. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. *Cf. Deitrick v. Greaney,* 309 U. S. 190, 84 L. Ed. 694, 60 S. Ct. 480; *D'Oench, D. & Co. v. Federal Deposit Ins. Corp.* 315 U. S. 447, 86 L. ed. 956, 62 S. Ct. 676.. In absence of an applicable Act of Congress *it is for the federal courts to fashion the governing rule of law according to their own standards. . . .*

"But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper

from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. And while the federal law merchant, developed for about a century under the regime of *Swift v. Tyson,* 16 Pet. (U. S.) 1, 10 L. ed. 865, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions."

In *United States v. Maryland Casualty Co.,* 64 Fed. Supp. 522, 527, Judge Yankwich said:

*"In interpreting specific obligations under a federal public works statute such as the Miller Act, we are governed by federal law."*

In *Royal Indemnity Co. v. U. S.,* 313 U. S. 289, 85 L. Ed. 1361, involving the liability of a surety in a bond given the federal government, Justice Stone, speaking for the court, said:

"But the rule governing the interest to be recovered as damages for delayed payment of a contractural obligation to the United States is not controlled by statute or local common law. In the absence of an applicable federal statute it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for nonpayment of the amount found to be due."

In *D'Oench v. Federal Deposit Insurance Corp.,* 314 U. S. 447, 86 L. Ed. 956, the court, referring to the Klaxon case, said:

"We held in the latter decision that a failure of a federal court in a diversity of citizenship case to follow the forum's conflict of laws rules "would do violence to the principle of uniformity within a state" upon which *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487, was based. 313 U. S. at p 496. The jurisdiction of the District Court in this case, however, is not based on diversity of citizenship. Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue or be sued in any court of law or equity, State or Federal. . . .

"For we are of the view that the liability of petitioner on the note involves decision of a federal not a state question under the rule of *Deitrick v. Greaney,* 309 U. S. 190, 84 L. ed. 694, 60 S. Ct. 480."

Justice Jackson, in a concurring opinion, said:

"These recent cases, like *Swift v. Tyson* which evoked them, dealt only with the very special problems arising in diversity cases, where Federal jurisdiction exists to provide nonresident parties an option forum of assured impartiality. *The Court has not extended the doctrine of Erie R. Co. vs. Tompkins beyond diversity cases.*

"This case is not entertained by the Federal Courts because of diversity of citizenship. . . .

"A Federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling

effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. Federal law is no juridical chamelon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the Federal Constitution, statutes, or common law. Federal common law implements the Federal Constitution and statutes, and is conditioned by them. Within these limits, Federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present. *Jackson County vs. United States,* 308 U. S. 343, 350, 84 L. ed. 313, 316, 60 S. Ct. 285."

In *Alameda County v. U. S.,* 124 F. 2d 611, involving a public works contract with the federal government for the improvement of San Leandro Bay, this court said:

"Regarding cases governed by federal statutes, shortly after the decision of *Erie R. Co. v. Tompkins, supra,* it was held that state law was not applicable in a tax case governed by a federal statute. *Lyeth v. Hoey,* 305 U. S. 188, 194, 59 S. Ct. 155, 83 L. Ed. 119, 119 A.L.R. 410. No reference was therein made to *Erie R. Co. v. Tompkins, supra.* However, in subsequent cases, *it is made clear that in those controversies where a federal statute controls, state law is not applicable, in* conformity with the statement of the rule in *Erie R. Co. v. Tompkins, supra,Dietrick v. Greaney,* 309 U. S. 190, 60 S. Ct. 480, 84 L. Ed. 694; *Russell v. Todd,* 309 U. S. 380, 60 S. Ct. 527, 84 L. Ed. 754; *Royal Indemnity Co. v. United States,* 313 U. S. 289, 61 S. Ct. 995, 85 L. Ed. 1361. Do not these cases demonstrate also that the statement in *Erie R. Co. v. Tompkins, supra,* that there 'is no federal general common law' is in words too broad, because *it is apparent that in such cases such law is applied?"*

In U. S. for use of *Spencer v. Maryland Casualty Co.* (C.C.A. 6) 18 F. 2d 204, the court held that the liability of the surety on a bond executed pursuant to the Miller Act is measured by the federal statute.

In U. S. for use of *Johnson v. Morley Construction Co.*, 20 Fed. Supp. 606, involving the Heard Act, the predecessor of the Miller Act, the court said:

> "As I have heretofore held in an opinion on a motion in this case . . . . the Federal Conformity Act. 28 U. S. C.A. Sec. 724, has no application to a suit under the so-called Heard Law, Accordingly the aforementioned provisions of the (N. Y. State) Civil Practice Act do not apply."

See also to the same effect:

*Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173, 87 L. Ed. 165;

*Guaranty Trust Co. v. York*, 326 U. S. 99, 89 L. Ed. 2079;

*U. S. v. Grogan*, 39 F. Supp. 819;

*American Surety Co. v. First National Bank*, (C.C.A. 4) 141 F. 2d 411, 416;

*O'Brien v. Western Union Telegraph Co.* (C.C.A. 1) 113 F. 2d 539.

### 3. THE STATE LAW ALSO SUPPORTS APPELLANT'S POSITION.

While this phase of the argument is of relatively minor importance, for the reasons hereinabove stated, nevertheless in passing we point out that the law of the State of

Washington supports, rather than opposes, the position of appellant herein. The following Washington cases definitely establish that the surety is not liable:

In *Lidral-Wiley, Inc. v. U. S. Fidelity & Guaranty Co.,* 179 Wash. 631, 38 P. 2d 346, in affirming dismissal of an action against the surety on a contractor's bond, the supreme court of Washington said:

> "Upon the challenge by respondent at the conclusion of the evidence, which was all introduced by appellant, the trial court sustained the challenge and dismissed the case, upon the grounds that appellant had failed to sustain the burden as to the bonding company of proving any right to recover any sum in excess of what it had already received; and therefore, as to the bonding company the motion for non-suit was granted. . . .
>
> "Appellant concedes *the rule followed in this state that it can in no event recover more than the amount due under the contract;* and as to rentals, can hold respondent liable only for the reasonable rental value of the equipment for the days it was actually moving and in operation.
>
> "Both parties conceded, and the trial court followed, the principles laid down in *State Bank of Seattle v. Ruthe,* 90 Wash. 636, 156 Pac. 540, and *Puget Sound Bridge & Dredging Co. v. Jahn & Bressi,* 148 Wash. 37, 268 Pac. 169, where we laid down the rule that a claim against the bond can only be for the reasonable value of the use of the rented machinery *not exceeding the contract price,* and for the time during which the proof clearly showed the machinery to have been used in the work. . . .

"The testimony is not at all definite and certain as to what was the actual number of days the Kenworth truck was in use under that provision of the contract. Conceding, however, it was in actual use one hundred days, as claimed by the appellant, which would amount to one thousand dollars, and that the other equipment was used as claimed by appellant, the total amount under the evidence and under the contract, *not exceeding the contract price* for the rental of such equipment is $3,143.48. Appellant has undisputedly been paid by the contractors and by Grant County a total of $3,869.31, making an over-payment of $725.91." (Above italics are the court's).

The court concluded as follows:

"Appellant's claim that it is not bound by the written contract, and the surety is liable for the reasonable rental value of the machinery used as orally understood before the written contract was made, is untenable. Under the cases cited above, THE SURETY CAN IN NO EVENT BE BOUND FOR A RENTAL VALUE IN EXCESS OF THE CONTRACT. Although appellant contends that it is not bound by the written contract for the reason that it is binding only as between the parties thereto appellant sued upon the written contract as a part of its cause of action. IF THE PRINCIPAL CONTRACTORS WHO SIGNED THE CONTRACT WITH APPELLANT ARE NOT BOUND OR LIABLE, THE SURETY MANIFESTLY WOULD NOT BE BOUND.

"WE HAVE NEVER PERMITTED RECOVERY AGAINST A SURETY ON A PUBLIC CONTRACTOR'S BOND FOR A GREATER RATE OF COMPENSATION THAN THAT PROVIDED FOR BY CONTRACT, and the cases cited by appellant, mentioned below, have not varied from that rule."

In *Terry v. U. S. Fidelity & Guaranty Co.*, 196 Wash.

206, 82 P. 2d 532, 119 A.L.R. 1276, the supreme court of Washington decided this question in favor of the surety, saying:

"Respondent brought this suit against the surety company, setting up two causes of action: (1) For recovery of the balance due for material actually removed; (2) for damages, by way of loss of profits, by reason of the fact that he was prevented by the contractors from removing some 4,742 cubic yards additional material contemplated by the contract. The jury returned a verdict on the first cause of action for $748.27, and for $348.33 on the second. Judgment was entered accordingly. . . .

"Whether unliquidated damages for breach of contract may be recovered against such a bond as this, is a question of first impression in this state. A number of cases have been cited which are thought to bear one way or the other upon the question. From our reading of the cited cases, it seems to us that only three deal with the subject specifically enough to require notice. *Burton v. Seifert & Co.*, 108 Va. 338, 61 S. E. 933; *Haakinson & Beaty Co. v. McPherson*, 182 Iowa 476, 166 N. W. 60; *Kampeska Materials Co. v. Bone*, 52 S. D. 559, 219 N. W. 244. In the first case, it is flatly held that such damages may be recovered against the bond. The second case seems to so hold, although it would appear that the bond there sued upon contained broader provisions than required by the statute. In the third case cited, it is flatly held that such damages are not recoverable against a statutory bond of this character.

"We feel, however, that, regardless of holdings in other jurisdictions, the question should be determined in the light of our own cases construing bonds executed pursuant to Rem. Rev. Stat., § 1159. Speaking of the purpose of bonds required by that statute, the court,

in the case of *American Sav. Bank & Trust Co. v. National Surety Co.,* 104 Wash. 663, 177 Pac. 646, said:

" 'It should be borne in mind that the legislature had in view here public works and buildings and was providing security and protection only to those who, if the work were private in its nature, would be protected by the lien laws. In other words, the bond given under this statute and in the statutory language becomes a substitute for the right of lien which would exist were the work private. And, therefore, looking to analogous lien cases for a rule as to who may claim under the bond, we find the prevailing doctrine to be that one who loans money is entitled to no lien therefor. . . .

" 'Hence, it logically follows that one who loans money to a contractor on public work cannot claim under the statutory bond.'

"And, in actions upon such bonds, the court has applied that standard of liability. The inquiry has uniformly been directed as to whether the claimant furnished labor, provisions or supplies, for the carrying on of the work. *Kongsbach v. Casey,* 66 Wash. 643, 120 Pac. 108; *National Surety Co. v. Bratnober Lumber Co.,* 67 Wash. 601, 122 Pac. 337; *City Retail Lumber Co. v. Title Guaranty & Surety Co.,* 72 Wash. 300, 130 Pac. 345; *State Bank of Seattle v. Ruthe,* 90 Wash. 636, 156 Pac. 540; *Puget Sound Bridge, etc. Co. v. Jahn & Bressi,* 148 Wash. 37, 268 Pac. 169; *National Grocery Co. v. Maryland Casualty Co.* 148 Wash. 387, 269 Pac. 4, 65 A.L.R. 256. In the next to the last case cited, the court said:

" 'Our rule is that, as against the bondsman of the principal contractor, a subcontractor performing services, or a materialman furnishing materials, can not recover in excess of the reasonable value of the services per-

formed or the reasonable value of the materials furnished.'

"Now, in the light of this statement and the rule as stated in *American Sav. Bank & Trust Co. v. National Surety Co., supra, we think it is clear that the bond is not liable for an unliquidated claim for damages against the contractor.* For it is the general rule that unliquidated claims for damages against a contractor cannot be established as a lien against the property upon which labor is performed or materials furnished. 40 C. J. 92, § 75; *Priest v. Murphy,* 103 Ark. 464, 144 S. W. 921; *Favalora v. Bourgeois,* 164 La. 521, 114 So. 119; *Goldberger-Raabin, Inc. v. 74 Second Avenue Corp.,* 252 N. Y. 336, 169 N. E. 405; *Dyer v. Wallace,* 264 Pa. 169, 107 Atl. 754; *St. John, etc. R. Co. v. Bartola & Genaro,* 28 Fla. 82, 9 So. 853; *Tabor v. Armstrong,* 9 Colo. 285, 12 Pac. 157; *Siebrecht v. Hogan,* 99 Wis. 437, 75 N. W. 71; *Seeman v. Biemann,* 108 Wis. 365, 84 N. W. 490. Hence, as indicated in *American Sav. Bank & Trust Co. v. National Surety Co.,* supra, *a subcontractor who has an unliquidated claim for damages against the contractor cannot establish the claim against the statutory bond.*

"The cause is remanded, with directions to modify the judgment accordingly."

The last word of the Washington state supreme court on the general subject is *Hamilton v. Whittaker,* 129 Wash. Dec. 164, 186 P. 2d 609, decided December 10, 1947, in which the court narrowly restricted the liability of the surety on a contractor's bond, and after summarizing some of its former decisions, said:

"We agree with the conclusion of the trial court. It is the duty of contractors on public works to furnish, at

their own expense, the machinery and equipment necessary to perform the work. . . .

"We hold that the charges for freight on equipment used by the contractor cannot be recovered as against the bond or the retained percentage."

In *Black Masonry & Contracting Co. v. National Surety Co.*, 61 Wash. 471, 112 Pac. 517, the court laid down the following rule for determining the liability of such sureties:

"When the contract is plain and unambiguous, or when its doubtful terms have been reconciled, whether by the one rule or the other, this court has, like all others, held the parties to their contract; for as is said in the books, '*a surety is bound by the contract he made, and not by some contract which he did not make,* even though the latter may be more favorable to him than the former.' *Sureties and guarantors are not to be made liable beyond the express terms of their contract.* The only question open in such cases is to determine what the contract is and enforce it."

In *Martin v. Shaen,* 26 Wn. 2d 346, 173 P. 2d 968, the court held that one cannot do indirectly what cannot legally be done directly.

Under the foregoing Washington decisions therefore, there is no liability of the surety herein in excess of the agreed contract price.

4. SURETY ON PAYMENT BOND UNDER THE MILLER ACT IS NOT LIABLE FOR DAMAGES OR INCREASED COSTS SUSTAINED BY SUB-

CONTRACTOR BY REASON OF BREACH OF CONTRACT BY PRINCIPAL CONTRACTOR.

The Miller Act, upon which this action is based, (U.S. C.A. title 40, sec. 270a and 270b) requires on every

> "contract, exceeding two thousand dollars in amount, for the construction, alteration or repair of any public building or public work of the United States . . . . a payment bond with a surety or sureties, satisfactory to such officer *for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract* for the use of each such person."

Section 270b provides:

> "Every person who *has furnished labor or material in the prosecution of the work provided for in such contract,* in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him, for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of the institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him."

The pertinent language of the bond herein sued upon (Pltf. Ex. 1; 96, 158, 172) is as follows:

> "Pursuant to the Act of Congress approved August 24, 1935, . . . . "Now, therefore, if the principal shall promptly make payment to all persons *supplying labor and material in the prosecution of the work provided for*

*in said contract,* and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modification to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue."

However, in this case appellee is seeking to enlarge the legitimate scope of this statutory and contractual liability of appellant. Manifestly this liability is restricted to claims for *"labor and material in the prosecution of the work provided for in said contract,"* namely, the contract between Macri and the government. This language is repeated in both the quoted sections of the statute and in the bond. That is clearly the maximum extent of the surety's liability contemplated by Congress when it enacted this statute and contemplated by the parties when they signed this bond.

But here appellee is seeking to recover damages for breach of either the subcontract or the prime contract, or both, on the part of Macri. True, he is seeking to do so by fallacious guise of seeking recovery of an alleged unpaid balance of the reasonable value of the work performed. However, with the relatively slight exception hereinabove stated (the retained percentage in the sum of $2656.46) appellee admittedly received from Macri prior to commencement of suit, full payment of the agreed contract price under the subcontract.

Moreover, as hereinabove pointed out, appellee's own

witnesses admitted that the said agreed contract price, namely $26.00 per cubic yard of concrete, represented the full reasonable value of the services performed by appellee under the subcontract. Admittedly, the only thing which increases appellee's claim above that point is the alleged breach of contract by Macri: (1) This breach, according to appellee's evidence, rendered it necessary for the latter to do various things which were outside of the scope of appellee's duties under his subcontract and which were things that were agreed to be performed by Macri. (2) Secondly, appellee's claim is increased above his contract price by reason of the fact, as he contends, that Macri breached his contract, and that this greatly delayed appellee in the performance of his work and increased his expense of doing so. There is no segregation of the amounts of these two claims.

Clearly neither of these claims constitutes a legal liability of the surety. Both of them manifestly constitute merely an indirect method of paying appellee damages for Macri's breach of contract, and therefore not recoverable from the surety. *Neither of these claims is for "labor and material in the prosecution of the work provided for in said contract."* They are both outside of rather than within the scope of the contract. Both of them were far in excess of the reasonable value of the concrete work appellee agreed to perform under the subcontract.

Appellee's contention and the district court's judgment seek to place in the Miller Act a guarantee by the surety which Congress deliberately chose to omit. They seek to write into the bond a guarantee provision which is nowhere to be found within the four corners of that instrument. They seek to make a contract for the parties, and particularly for this appellant surety, which none of the parties, and certainly not this appellant, ever agreed to. Clearly this cannot lawfully be done.

Neither the Miller Act nor this bond states or even suggests that the surety undertakes the obligation of guaranteeing payment to subcontractors or others of damages sustained by them by reason of breach of either the prime contract or the subcontract by the principal contractor.

Consequently, to so extend the surety's liability would be wholly illegal and unjustifiable.

So long as laborers, materialmen and subcontractors are paid the full amount of their agreed contract prices for the work which they contracted to perform, the intent of Congress has been carried out and the liability of the surety has been fully satisfied.

This case suggests a ready object lesson of the undesirable practical consequences if appellee's view were accepted. It will be noted that the district court entered judgment in favor of a single claimant against the surety

for $56,764.97, together with interest and costs, which is almost the full amount of the payment bond, namely $64,-275.48. The Miller Act prescribes that the amount of the payment bond shall be one-half of the contract price. It will thus be seen that this left only a relatively small balance of $7510.51 to furnish protection to the large numbers of laborers and materialmen, as well as other subcontractors, if any. Such an interpretation would be most unfair to the other laborers and materialmen, and would certainly be wholly opposed to the intent of Congress in enacting this legislation for their benefit and protection.

Such an unwarranted expansion of the liability of sureties on such bonds would also mean a substantial increase in the premiums charged therefor, and a resulting increase in the amount of contractors' bids and in the cost to the government of all public construction projects.

Appellee concedes that he has made no attempt to segregate his costs of performing his subcontract as originally agreed to, and his *increased costs* of performing his subcontract *plus* a portion of *Macri's obligations* under the prime contract, by reason of Macri's breach thereof. This is conclusively shown by the portions of the record hereinabove quoted in the statement of the case.

It is further self evident that appellee's claim is outside of, rather than within, the contract.

It is not within, nor governed by, any obligation undertaken by appellee when he entered into this contract. It is admittedly practically double the reasonable value of the work to be performed by Schaefer under the subcontract. Appellee's claim admittedly arises from a large amount of work performed by his men which was entirely outside of the scope of his concrete work under his subcontract.

Likewise, as to the second phase or category of appellee's claim, namely, that his cost of performance was increased by Macri's delay and improper performance of his obligations under the subcontract and principal contract—this also is clearly outside of the scope of the reasonable value of the work agreed to be performed by Schaefer under these contracts. It follows that the claim is entirely outside of the scope of the surety's liability under the statutory payment bond.

*Appellee's claim is directly predicated on Macri's alleged breach of contract and not on appellee's furnishing of labor and material pursuant to contract.*

A surety, under the Miller Act, is clearly not liable for damages for breach of contract by the principal contractor, either on *quantum meruit* theory or otherwise. Especially is this true where, as in this case, there is admittedly no segregation of the claimant's expense items within and outside of the contract.

Obviously compensation for any loss or increased cost sustained by appellee due to acts or omissions of Macri in breach of the contract is damages, no matter by what name it may be called. "A rose by any other name will smell as sweet."

Appellee concedes that he was not required to pour a single yard of concrete in addition to that originally contracted for. The scope of his contract was never increased. The additional costs sued for are merely claims for items of damage caused by Macri's breach. The surety should certainly not be penalized and subjected to an action for damages merely because it is labeled quantum meruit—and especially so when it is admitted that the claim arises entirely by reason of the fact that appellee was damaged, as he contends, by Macri's breach. Admittedly there was nothing unusual about ehe performance of the work by Schaefer except that he complains of Macri's acts and omissions which resulted in increasing his costs.

Appellee must concede that all his costs over and above his contract price were directly caused by and attributable to Macri's breach. How, then, can he reasonably deny that what he is actually seeking here is to recover from the surety damages for Macri's breach of contract? This is an obligation never assumed in the surety's contract and never imposed upon it by Congress.

Appellee's claim is based upon damages for Macri's

breach and damages which are entirely outside of the scope of the contract. So long as appellee has admittedly received full payment (with said slight exception) of the full agreed contract price under the subcontract, and which also admittedly represented the full reasonable value of the work to be done by appellee under the subcontract, there cannot possibly be any further liability of the surety to appellee.

Obviously the surety is not a party to the subcontract between Macri and Schaefer, and by its payment bond appellant did not guarantee performance of the contract on the part of either and did not assume liability to either for damages for breach thereof.

The only obligation assumed by the surety under this bond was to guarantee payment of the agreed contract price for labor and materials furnished in the prosecution of the work under the contract. The surety did not guarantee payment for labor and materials furnished because the prime contractor breached his contract by delaying the job or failing in some other way to do things required of him under the subcontract.

Appellee's whole claim is predicated upon the fact that due to Macri's fault appellee was required to do work that was not required of him under his subcontract, and which it would not have been necessary for him to do except for Macri's failure to perform his part of the sub-

contract. Obviously, however, a claim to be compensated for this additional expense or for damages based thereon, is not a claim for 'labor and materials in the prosecution of the work provided for in the contract," but rather is a claim for damages for compensation for work which was rendered necessary for him to do because of Macri's failure to do so as required by the subcontract. Admittedly, if Macri had performed his obligations under the contracts, none of this additional labor and expense would have been required, and since it never was required in the performance of Schaefer's obligations under the subcontract, it does not constitute a valid claim against the surety.

Appellee's contention is especially unfair to the surety in view of the admitted fact that the latter never had notice of Macri's alleged breach until after the job was fully completed. If its liability were so extended, it had no fair opportunity to protect itself.

This unwarranted extension of the surety's liability is wholly illegal as compensation for damages sustained through Macri's breach, even though sugared with the verbiage that the same represents a reasonable value of work performed. Appellee cannot deny, however, that the only reason that reasonable value of his work was increased above the amount heretofore paid, was by reason of the damages he sustained due to Macri's breach.

*This increased expense of performance was outside*

*of the scope of appellee's obligations under the subcontract and outside of the scope of Macri's obligations under the prime contract with the government. What was done by appellee, not already fully paid for, was not required by any of the terms of the contract, but became necessary because of Macri's alleged breach or wrong against appellee, resulting in loss or damage to him.*

The Columbia Basin Project within the territorial jurisdiction of this court (as well as other federal irrigation construction projects) is just in its infancy. Certainly the commendable purpose of protecting labor and material on government projects should not be confused with allowing unlimited recovery of damages for losses sustained in any guise where there is a breach of a subcontract, as between prime contractor and subcontractor.

In *United States v. Seaboard Surety Co.*, 26 F. Supp. 681, Judge Baldwin, of Montana, held that the surety's liability could not be so extended, saying:

> "It is said in U. S. to Use of *Hill v. American Surety Company*, 200 U. S. 197, 203, 26 S. Ct. 168, 170, 50 L. Ed. 437: 'The purpose of the law is, as its title declares: 'For the protection of persons furnishing materials and labor for the construction of public works;' " which evidently *does not include a guarantee of profits which a contractor or subcontractor may expect to make, or a promise to make good any loss that either of them may suffer. If such had been the Congressional intent, it would have been easy to express it in plain words. This was not done;* and, on the other hand

*Congress limited the right to bring suit on the bond* in the name of the United States to the person or persons supplying the contractor with labor or maaterials and to them only upon furnishing affidavit to the department under the direction of which said work has been prosecuted that labor and materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made. The bond involved in this case appears to be conditioned as provided in this statute and it must be read in the light of the true intent and purpose of the act. . . .

"To hold that Watsabaugh & Company have a right to recover from the defendant Seaboard Surety Company for *the loss, if any, suffered by them because of delays growing out of the acts or omissions of others would be to add to the terms of the agreement. This the law does not permit.* In the construction of an instrument the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, *not to insert what has been omitted* or to omit what has been inserted. . . . It follows that Watsabaugh & Company *have no right to recover from the defendant* Seaboard Surety Company for *the loss,* if any, *suffered by them because of delay growing out of acts or omissions of others.*"

Also directly in point is the leading case of *Friestedt Co. v. U. S. Fireproofing Co.,* (C.C.A. 10) 125 F. 2d 1010. The court approved the Montana case and held that the surety's liability could not be so extended, saying:

"*Stripped of all technicality,* plaintiff and intervenor *seek to recover damages claimed to have been incurred because of the breach by the contractor of an implied covenant in the subcontract against unreasonable delays preventing the subcontractors from proceeding*

*with their work.* The parties recognize this, because in the only point relied upon in their designation of points, it is asserted that: '. . . . a subcontractor can recover his damages consisting of expenses made necessary by the delay of the principal contractor in a proceeding to recover on the bond under the Heard Act, 40 U. S. Code, Sec. 270.' They cite numerous authorities to sustain their position that every contract contains an implied warranty against unnecessary delays and that recovery may be had for loss resulting from a breach thereof. *These decisions are beside the point, because they arose in actions against the contractor for damages and not against the surety on a Heard Act bond. . . .*

"In each of these cases the Act was liberally construed to protect those furnishing labor and material that went into the construction covered by the contract. It is to be noted, however, that in every instance recovery was allowed on the bond because the outlays for which recovery was sought were necessary for the performance of the contract and were within the contemplation of the parties to the contract.

"Here the contract required plaintiff and intervenor to furnish labor and material and perfect certain constructions. They performed their part of the agreement and received their agreed compensation provided for in the contract. There is here no claim that they furnished any extras necessary for the completion of the contract and therefore contemplated by the parties and implied in the contract. *The claim for which the parties seek recovery here did not arise under the contract, but outside of the contract. What was done was not required by any of the terms of the contract, but became necessary because of an alleged breach of the contract because a contractor violated one of the terms of the contract; in other words, committed a wrong against the parties resulting in loss or damage to them.*

"*We know of no case that has gone so far as to hold that one may recover damages for breach of a contract on a bond required under the Heard Act. The only case deciding this precise question has held to the contrary.* See *United States v. Seaboard Surety Co.*, D. C. Mont., 26 F. Supp. 681. *We fail to discern anything in the Heard Act evidencing a Congressional intent to protect one under the bond required by the Act against damages resulting from breach of contract. Had such been the Congressional intent, it no doubt would have been evidenced by appropriate language.*"

In *U. S. v. Maryland Casualty Co.*, 54 F. Supp. 290, the court discussed, and refused to follow, the two Washington cases relied upon by appellee, but followed the rule of the foregoing federal cases. The court even granted a summary judgment of dismissal in favor of defendant surety, and said:

"We are unable to distinguish in principle the present from the Friestedt case. *While the plaintiff calls its demand one for the rental or the use value of its equipment, it is in reality for the damage caused* by keeping the equipment idle in compliance with the orders of the Government engineer—in other words, for a breach of the implied obligation that it would be permitted to perform without interference. It is not a claim for money paid to others for the rental of the machinery, as was true in some of the cases cited, but *for what it lost*, because of its inability to use or remove the equipment. . . .

"The conclusion is that the nature of the demand is such that it does not disclose a right to recover against the surety for labor and materials furnished under the statute and bond given pursuant thereto."

The foregoing decision was affirmed in *U. S. v. Maryland Casualty Co.*, (C.C.A. 5) 147 F. 2d 423, where the court said:

> "Upon answer and amended answer of Bond Company the issue finally, and according to appellant, was amplified to: "Whether or not a surety on a bond given under 40 U.S.C.A. § 270a is liable for the use value of or rent on equipment furnished in the prosecution of public work, while such equipment is kept idle on the job by the government engineer in charge of the work, but for no reason contemplated by the contract. Stated differently, is or not the use value or rent on equipment, under the circumstances stated, 'material' within the meaning of and covered by such statute and bond? . . . .
>
> "While the question here is not without its difficulties, the great weight of authority leads to the conclusion that while such a bond with its enabling enactment, which we have here under consideration, must be liberally construed, we are not warranted in writing liability into the contract and the statute. Nothing was owing for work, labor or equipment, and nothing was owing for material in the prosecution of the work; no modifications of the contract had been made or were contemplated. All that transpired was that, without fault of the subcontractor, the Government engineer ordered the work stopped and declined to permit the removal of equipment. *This was a breach of the contract, and it may be that appellant is entitled to recover for this breach as against the prime contractor or the Government, or both, but it becomes patent that we are not warranted in fastening upon the Casualty Company liability on its bond for this breach. Friestedt Co. v. U. S. Fireproofing Co.*, 10 Cir., 125 F. 2d 1010; *United States for the Use of Spencer v. Massachusetts Bonding Co.*, 6 Cir., 18 F. 2d 203; *Clifford F.*

*MacEvoy Co. v. United States for Use and Benefit of the Calvin Tompkins Co.*, 322 U. S. 102, 64 S. Ct. 866; *American Surety Co. v. Wheeling Structural Steel Co.*, 4 Cir., 114 F. 2d 237; *Babcock & Wilcox v. American Surety Co.*, 8 Cir., 236 F. 340; *United States, to Use of Watsabaugh & Co., et. al. v. Seabord Surety Co.*, 26 F. Supp. 681; *United States v. Hercules Co.*, D. C. 52 F. 2d 454. . . .

"The appellant has cited many cases which we have carefully considered. *In every instance, however, where recovery was allowed on the bond, the outlay for which recovery was sought was necessary for the performance of the contract and was within the contemplation of the parties to the contract.* It is without dispute that the injury alleged to have been suffered here by the appellant was not contemplated by the parties, but was totally unexpected and unforeseen.

"We are of opinion and so hold that Maryland Casualty Company should be and is absolved from liability on its bond.

"We find no reversible error in the record and the judgment is affirmed."

The authority which we especially desire to stress is the decision of Judge Coleman of Maryland in *United States v. John A. Johnson & Sons*, 65 F. Supp. 514, 526-632. The district court in instant case frankly conceded that his decision was diametrically opposed to that of Judge Coleman, and that that case, if followed, would preclude recovery by appellee herein against the surety. (2215). He also stated that that case should be followed if federal

law governs. The court quoted and followed the foregoing federal authorities and said:

> "The questions now before us arise out of a suit under the Miller Act, § 1, 40 U.S.C.A. § 270a. . . .
>
> "The substance of the second counterclaim is that the general contractor, although having expressly agreed to provide temporary construction of every nature, necessary to the completion of the work on the project by the subcontractor within the specified time, including the providing of access to the construction site, the general contractor nevertheless failed to provide such access and that, as a result, the progress of the work by the subcontractor was materially interfered with and delayed, *thus greatly increasing the cost to the subcontractor,* whereby he was damaged in the sum of $13,740.01. . . .
>
> "Coming, then, to the motion to dismiss the other counterclaim of the subcontractor Friedman, the basic question here is whether under the Miller Act a subcontractor may recover damages against a general contractor and his surety on a *claim which is directly predicated on a breach of contract by the general contractor and not on the furnishing of labor and material by a subcontractor pursuant to contract.*
>
> "That this is a suit by the subcontractor for such breach of contract by the general contractor seems clear. . . .
>
> "It may well be that the subcontractor has a meritorious claim against the general contractor, in a separate suit in a State court (not in a Federal Court because diversity of citizenship is lacking), but the question here is: Can this claim be prosecuted in this particular statutory proceeding? Under the statute, the general contractor is required to give two bonds: One a performance bond for the protection of the Government;

the other a payment bond for the protection of persons furnishing labor and materials. It is the latter with which we are here concerned. Its obligation is to "promptly make payment to all persons supplying labor and material in the prosecution of the work *provided for in said contract,* and any and all duly authorized modifications of said contract that may hereafter be made. . . . *Thus, it is clear that the obligation by which the general contractor and surety are bound to subcontractors excludes payment for everything except labor and material actually called for by the contract between the general contractor and the Government, which is made a part of the contract between the general contractor and the subcontractor.*

"We have been referred to no proceeding, either under the Miller Act or the Heard Act, 40 U.S.C.A. § 270, of which it is an amendment, where jurisdiction over a claim such as the present one has been exercised. . . .

"However, we think this is immaterial, provided the subject of the suit arises under the contract, or under the provisions of contracts that are reciprocal. We do not find that such is true in the case before us. . . .

"To repeat, we think a distinction must be made between doing work which is of an extra or additional character, or reasonably implied by the terms of the contract as *part of the obligation of the subcontractor,* and work which, *as in the present case, not he but the main contractor alone is, by the very terms of the agreement, required to do. The distinction is, in a sense, narrow and technical, but it goes to the very essence of the restricted rights given by this special statute, the Miller Act.* We are not unaware of the fact that there are numerous decisions to the effect that a liberal construction must be given to the Miller Act and its predecessor, the Heard Act. . . . *But the liberality of construction referred to in those decisions is not meant to go so far as to extend the scope of the*

*Act and to embrace a claim for damages such as the present one. . . . .*

"It must necessarily follow that the Rules of Civil Procedure, and specifically Rule 13 (a), (b) and (h), can not be construed to extend the scope of the Miller Act. . . .

"It may well be that in an ordinary suit, these Rules would extend the scope of the action to permit the consolidation of all claims. But we are unwilling to say, just because of their broad language, that the present type of claim can be entertained in a Miller Act proceeding.

"Finally, it may reasonably be argued from the dearth of authorities on this precise question, that, *in line with the Friestedt case, it has been generally conceded that this type of claim was not cognizable* under either the Heard Act or the Miller Act. But however that may be, *both the weight of such authority as exists, and logical interpretation of the statute, require the conclusion here reached.*

"We are not unmindful of the fact that, in another part of this same proceeding we have allowed this same subcontractor to recover from the general contractor on a counterclaim for extra material and labor he had furnished, on the ground that there was an improper rejection by the general contractor of the material originally supplied. That is to say, we held that the subcontractor was entitled to be paid what this improper rejection had cost him, due to replacing the material with material of higher grade.

"Such counterclaim, it is true, was based upon breach of contract in the sense that the general contractor had not lived up to his part of the agreement in so far as a duty to inspect the material, originally supplied, was imposed upon him in the first instance. However,

by the express terms of the last paragraph of Article IV of the subcontract, which we have previously quoted, the subcontractor and not the general contractor was required to replace the material when ordered so to do by the general contractor, without prejudice to the right given him by the subcontract to have a later determination as to whether or not he should have reimbursement, for any additional expenditures as a result of such replacement. So, it will be seen that the performance by the subcontractor, upon which he based his right to recovery, was *performance such as was expressly required of him by the contract for which, and only for which, he could recover under the payment bond* which we have heretofore analyzed; whereas, in the present case, there is the distinction that the subcontractor has not supplied labor and materials which he was, in fact, ever required to supply by the terms of the contract. Thus, *the subcontractor's present counterclaim is for damages as such, resulting from the general contractor's alleged breach of the contract, although it is true the alleged damages are measured by the cost of labor and materials to the subcontractor which the general contractor, if any one, should have supplied but did not. The distinction is more than a mere technical one. It is a legal distinction required by the very terms of the documents by which the subcontractor is restricted in this limited, statutory proceeding.*

"Accordingly, an order will be signed granting the motions to dismiss both the counterclaims of the subcontractor."

Parenthetically, it may be added that no appeal was taken by the claimant from the hereinabove quoted portion of Judge Coleman's decision. An appeal was taken from an entirely different portion of that decision and the same was affirmed and the decision expressly approved in

(C.C.A. 4) 153 F. 2d 534, certiorari denied, 328 U. S. 865 90 L. Ed. 1636. Judge Coleman's decision related to two entirely separate and independent phases of the case, the second phase, and the one pertinent here, commencing at page 526. At page 525 the court said:

> "*The distinction between the two questions is real, not fanciful.* For example, delays incident to permitted changes in original specifications do not amount to a breach of a contract of this sort. It is a matter for equitable adjustment by the Government by express provision of the general contract relating to changes."

See also to the same effect *U. S. for Use of Spencer v. Massachusetts Bonding & Ins. Co.*, (C.C.A. 6), 18 F. 2d 203.

We therefore respectfully submit that both on reason, principle and authority, and particularly the overwhelming trend of the federal decisions, there is no liability of a surety on a payment bond for damages or compensation for increased expense of performance by a subcontractor due to breach of contract on the part of the principal contractor, whether or not such damages are sought under the sheep's clothing of reasonable value of work performed—especially where, as in this case, it is conceded that the cost and reasonable value of performance were increased over and above the agreed contract price and above the amount paid solely by reason of the principal contractor's breach of contract.

The language of the Supreme Court in the recent

case of *McEvoy v. United States*, 322 U. S. 102, 88 L. Ed. 1163, the last word of that Court on the subject, (while involving a different question) is we submit directly applicable to this question:

> "We granted certiorari because of a novel and important question presented under the Miller Act. 320 U. S. 733, ante 433, 64 S. Ct. 267. . . .
>
> "Specifically the issue is whether under the Miller Act a person supplying materials to a materialman of a Goernment contractor and to whom an unpaid balance is due from the materialman can recover on the payment bond executed by the contractor. We hold that he cannot. . . .
>
> "To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers of the Act. . . .
>
> "*To impose unlimited liability under the payment bond to those sub-materialmen and laborers is to create a precarious and perilous risk on the prime contractor and his surety. To sanction such a risk requires clear language in the statute and in the bond so as to leave no alternative.* Here the proviso of § a (a) of *the Act forbids the imposition of such a risk,* thereby foreclosing Tompkins' right to sue on the payment bond."

## 5. IN ANY EVENT SURETY NOT LIABLE FOR ANY ITEMS EXCEPT LABOR EXPENSES.

In any event the district court clearly erred in allowing recovery for any items other than labor and materials actually going into the finished job. For example, the court

with considerable hesitation and reluctance allowed recovery of an additional twenty percent of the total amount of appellee's claim, namely $13,542.57, for "overhead expense" and allowed an additional ten percent of the total, or $8,125.42, for appellee's profit.

Such overhead expense and profit items are not for labor and materials, and are not recoverable against the surety.

*U. S. v. Davidson,* 71 F. Supp. 401;

*U. S. for use of Healie v. Great American Indemnity Co.,* 30 F. Supp. 613;

*U. S. v. Standard Casualty Co.,* 32 F. Supp. 836;

*Continental Co. v. Boyd,* 140 F. 2d 115;

*Theobold-Jansen Electric Co. v. Meyer,* (C.C.A.) 87 F. 2d 271;

*U. S. for use of Spencer v. Massachusetts Bonding & Ins. Co.,* (C.C.A. 6) 18 F. 2d 203;

*Hamilton v. Whittaker,* 129 Wash. Dec. 164, 186 P. 2d 609, supra, and cases there cited.

Exhibit 63 contains appellee's itemized computation of his claim for damages. The first item, which is the largest, covers alleged labor expense. The remainder are clearly, in any event, not allowable, as they do not constitute claims for labor and material going into the finished job. Part of them represent the purchase and repairing of tools and equipment, which are clearly not a lienable claim against the bond. This applies to all of the items

on this exhibit other than the strictly labor items. Under the authorities hereinabove cited, these are clearly not, in any event, recoverable against the surety. Such items as insurance, taxes, equipment, lumber and roofing for cement shed, travel, miscellaneous, bond premium, overhead expense, and profit, clearly do not come within the statutory terms "labor and material in the prosecution of the work provided for in said contract," and hence are not recoverable against the surety.

The district court disallowed the items for engineering and legal expenses, as the same were merely cost of preparation for the trial of this litigation. The court should have disallowed each and all items of this exhibit.

With reference to overhead expense, it is undisputed that Schaefer simultaneously had a large number of jobs in progress, all of which were handled from his Portland office. All supervision of the work on this job, including his superintendent in charge of the job, is included within his labor payroll, which covers everyone except the appellee, Schaefer himself, and he was on the job only on a few isolated, rare occasions. Even Schaefer's brother, William Schaefer, was carried on the labor payrolls of this job, at $100.00 per week, but made only a few trips and was rarely on the job. The overhead of the Concrete Construction Company in Portland was therefore during that period extraordinarily high.

The district court therefore clearly erred in allowing recovery of these various items against the surety.

## VI.

## 6. APPELLANT IS ENTITLED TO ADDITIONAL ATTORNEYS' FEES ON THIS APPEAL.

As hereinabove stated, the Macris and their silent partners, Goerig and Philp, are liable to this appellant on the application for the bond (Casualty Co. Ex. 10) for additional reasonable attorneys' fees, which should be fixed by this court for legal services on this appeal.

We submit that $5000.00 is a reasonable sum to be allowed this appellant for reasonable attorneys' fees for services on this appeal, in view of the voluminous size of the record, the extensive services required, and the large amount involved.

It is well settled that federal appellate courts may, and customarily do, allow such recovery of additional reasonable attorneys' fees for services on appeal. For example, in *American Can Co. v. Ladoga Canning Co.*, (C.C.A. 7) 44 F. 2d 763, 772, certiorari denied, 282 U. S. 899, the court said:

> "The District Court, however, could not and doubtless did not take into consideration the uncertain factor of a possible appeal, nor the legal services which might be rendered in case an appeal was prosecuted. Since

the judgment was entered in the District Court, defendant has taken this appeal, and plaintiff's attorneys have rendered additional necessary and substantial legal services. Plaintiff should be allowed their reasonable value, which we fix at $3,500.

"The statute authorizing plaintiff's recovery of reasonable attorneys' fees directs their inclusion as a part of the costs. We find nothing in this statute which limits this allowance to services rendered in the District Court. Its terms are broad enough to include plaintiff's reasonable attorney's fees necessarily incurred in any court wherein the cause was pending. A similar construction has been placed on a similar statute. *Davis v. Parrington* (C.C.A.) 281 F. 10, 17; *Louisville & N. R. Co. v. Dickerson* (C.C.A.) 191 F. 705, 712.

"The decree is affirmed. The Ladoga Canning Company shall recover its costs on both appeals, including therein, as a part of the costs of this court, $3,500, as and for its reasonable attorneys' fees."

See also to the same effect:

*Davis v. Parrington,* (C.C.A. 9) 281 F. 10, 17;

*Rigopoulous v. Kervan,* (C.C.A. 2) 140 F. 2d 506, 508.

We therefore respectfully submit that the judgment appealed from should be reversed and the cause dismissed as to this appellant, Continental Casualty Company, and that the judgment entered by the trial court in favor of this appellant against the cross-appellants for reasonable attorneys' fees and costs be affirmed, and that this appellant recover judgment against each of said cross-appellants, Macris, Goerig and Philp, jointly and severally, for its

additional reasonable attorneys' fees on this appeal in such an amount as may be fixed by this court.

Respectfully submitted,

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